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No. 82-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF SOUTH CAROLINA, et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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This reply is submitted by petitioners, State of South Carolina, South Carolina Public Railways Commission, and The American Short Line Railroad Association in response to the brief in opposition filed jointly by Seaboard Coast Line Railroad ("SCL") and Southern Railway System ("SRC") (sometimes referred to collectively as "rail respondents").

Petitioners are constrained to respond to two aspects of the brief in opposition of rail respondents. First and foremost, petitioners categorically reject the allegation that they have been less than candid with the Court. Such a suggestion is totally unfounded and is particularly offensive in view of the serious

distortions, inaccuracies and unfounded assumptions contained in the rail respondents' brief in opposition. Petitioners have no desire to engage in an unprofessional exchange of accusations which can serve only to divert the Court's attention from the important substantive question presented by this case. At the same time, however, petitioners feel obliged to respond to rail respondents' charges lest silence be construed as acquiescence.

At page 19 of their brief in opposition rail respondents accuse petitioners of "several inaccuracies" and suggest those asserted inaccuracies as a basis for denial of the petition pursuant to Rule 21.5 of the Rules of this Court. It might be expected that such a serious allegation would be supported by reference to genuine inaccuracies. However, examination of the "inaccuracies" alleged by rail respondents reveals that it is their representations rather than those of petitioners that are inaccurate.

The first such charge is that petitioners were in error in asserting that the Port Terminal Railroad of South Carolina ("PTSC") is a common carrier in its own right holding itself out to the public to provide service on its lines. Rail respondents contend that this is wrong because PTSC "does not contract directly with the shippers who move grain to Charleston using Railroad Respondents' facilities". The transportation services involved in this dispute are performed pursuant to applicable tariff rates rather than the terms of a negotiated contract. PTSC is a party to the tariffs which govern the services that it performs. This is precisely what petitioners said in language which rail respondents attack as "misleading". The precise language in question is as follows:

> It [the ICC decision] ignores the fact that PTSC is a party in its own right to tariffs applicable to the involved traffic.

Rail respondents reject this representation as "flat wrong". Yet it is completely accurate.

Rather than publishing a separate, independent tariff, PTSC

participates jointly in a single publication containing the rules and regulations of many carriers. Such a publication, to which PTSC was a party at all times relevant to this proceeding, is ICC SCL 8031-B which contains, *inter alia,* the rules and charges governing switching, aborption, demurrage and other terminal charges or allowances applicable to transportation operations performed on the lines of PTSC. That publication, instead of internally specifying the actual demurrage charges assessed by PTSC and other participating carriers, contains a provision which incorporates by reference the provisions of other tariffs which contain the actual demurrage charges. Specifically, Item 130 of ICC SCL 8031-B provides that, subject to an exception, PTSC will apply the demurrage charges published in ICC SFA 9326 to export or intercoastal traffic and the demurrage charges published in ICC PHJ 6004-L to all other traffic. The exception, which is stated in Item 130, applies where traffic is delivered to PTSC pursuant to a line-haul tariff such as ICC SFA 4020-A which contains special detention charges and rules. In those instances PTSC will apply the special rules in the line-haul tariff rather than the standard rules contained in ICC SFA 9326 or ICC PHJ 6004-L. By virtue of Item 130, the demurrage charges published in ICC SFA 4020-A are incorporated by reference in PTSC's tariff just as if they were physically reproduced therein. Thus, contrary to the assertions of rail respondents, the assailed statement is not "flat wrong". It is absolutely accurate and in no way misleading.

The only other "inaccuracy" cited by rail respondents to support their charges is the allegation that petitioners were in error in identifying *Missouri Pacific Railroad Company* v. *Reynolds Davis Grocery Co.,* 268 U.S. 366 (1925) as the principal case relied on by the ICC in its *sua sponte* revelation that PTSC is an agent of the inbound line-haul carriers that move grain to Charleston. Rail respondents suggest that the principal case on which the ICC actually relied is *A.F. Pringle & Co., Inc.* v. *Atlantic Coast Line R. Co.,* 278 ICC 655 (1950). Even if rail respondents were correct in their contention, to accuse the opposing side of inaccuracy and lack of candor on the basis of a

dispute as to which case is the principal authority for a position taken by the tribunal whose action is under review is conduct inappropriate to litigants before this Court. Such conduct is particularly egregious in that any fair reading of the ICC decision clearly reveals that the *Pringle* case was cited in passing only for the general proposition that "it is common practice for terminal carriers to act as agents for line-haul carriers" (App. 21a). This is a proposition which is not here in dispute. Rather, it is with respect to the further finding that "the facts of this case lead us to conclude that the switching roads are agents of the line-haul carriers" that the ICC was in error. It is in support of that erroneous finding that the ICC cites the *Missouri Pacific* case as its principal authority (App. 21a-22a). That is precisely what petitioners represented to this Court. Thus, the charge made by rail respondents is totally baseless.

If rail respondents' allegations are instructive for any purpose, it is to demonstrate their propensity for obfuscation of a complex issue, which, petitioners submit, confused the Court below and caused it to grant undue deference to the ICC's agency expertise. This propensity is also evidenced by the rail respondents' brief in opposition. Petitioners have no desire to burden the Court with a detailed refutation of those defects. However, petitioners believe that identification of some of the more salient misstatements is appropriate in order to demonstrate the handicap of deliberate confusion imposed upon the Court below.

At the outset of their brief in opposition, rail respondents attempt to suggest that the position of petitioners with respect to the pivotal issue in this proceeding has been consistently and unanimously rejected at every level of consideration. They ignore the facts that the position of petitioners was determined to be completely meritorious by the Administrative Law Judge who conducted the evidentiary proceedings and by the ICC Review Board of senior career employees who affirmed that decision on appeal. It was only after an appeal had been taken by the rail respondents to the U.S. Court of Appeals for the

Fourth Circuit and the case was in the midst of being briefed, that the matter was recalled by the ICC and a determination unfavorable to petitioners was issued by the ICC. Thus, contrary to the impression that respondents seek to convey to this Court, decisions rendered by those who have considered this controversy do not reflect either consistency or unanimity. Quite the contrary, the diametrically opposed positions of the ICC on the one hand and, on the other, the Administrative Law Judge and ICC staff members (who actually possess such expertise as may exist within the agency) demonstrate that the issue presented in the instant petition is both controversial and substantial.

In a similar vein, respondents suggest that "petitioners do not contend that the case involves an important federal question that should be settled by this Court". Such an allegation is so clearly at odds with the facts that it raises serious questions as to whether it could have been made with candor. At the very outset of their petition to this Court, petitioners have identified the importance and the far-reaching consequences of the ICC decision as to which review is requested. Indeed, as was also explained in the petition, the ICC itself recognized the issue to be resolved as one of "general transportation importance" (App. 16a) and as one of novel impression (App. 20a).[1]

The inappropriately adversarial "Statement Of The Case" presented by rail respondents is also larded with fundamental misstatements. At the very outset of the statement they contend that "Petitioners seek to secure something for doing virtually nothing". What petitioners seek is compensation for PTSC for terminal services which it provides at considerable cost. PTSC presented unrebutted testimony that it spends thousands of dollars annually to maintain holding tracks in accordance with Federal Railroad Administration safety standards. It also

[1]The significance of the designation of the case as one of "general transportation importance" is clearly evident from the fact that of the 30,696 formal proceedings before the ICC in 1981, only a handful were determined by the ICC to present questions of "general transportation importance".

presented unrebutted testimony as to costs incurred in surveillance, recordkeeping and other functions essential to effective administration of demurrage rules. These are tangible expenses which have traditionally been paid for with the portion of demurrage charges retained by the carrier on whose lines the cars are held. By contrast, SCL and SRC incur no costs in connection with cars held on the lines of PTSC. Therefore, it is rail respondents and not PTSC who are seeking something for nothing.

Rail respondents then go on to suggest that PTSC is somehow in a position to increase the amount of demurrage charges which accrue on its lines by operating inefficiently. This allegation has absolutely no support in the record or in the decisions below. Quite the contrary, the testimony submitted to the ICC establishes that PTSC is an extremely efficient carrier and rail respondents know this to be the case. Furthermore, the "assumption" that PTSC switches cars only at infrequent intervals is known by rail respondents to be at odds with PTSC's actual pattern of operations which characteristically involves three or four switches each day. Rail respondents' "assumption" also ignores the critical fact that a shipper is required to pay demurrage charges only during periods when cars are being held at the shipper's request. Until the cars are tendered to the shipper, they accrue no demurrage; as soon as the shipper releases the cars, demurrage ceases to accrue regardless of when the line-haul carrier actually removes them. Therefore, the efficiency with which PTSC handles cars has no bearing on the amount of demurrage that accrues on its lines.

In their statement of the case, rail respondents also incorrectly suggest that "the full Commission and the Court of Appeals both *apparently* recognized the opportunity for abuse that existed under the old system" [Emphasis added]. That statement is absolutely incorrect. Neither the decision of the ICC nor the decision of the U.S. Court of Appeals contain any expression of concern as to either actual or potential abuse of demurrage provisions by PTSC. That contention is wholly one of rail

respondents' creation and it is obviously stated to this Court for the purpose of prejudicing the position of petitioners by suggesting, without the slightest support in the record or the decisions below, that PTSC has ever acted improperly in connection with the administration and enforcement of applicable demurrage rules.

Furthermore, the suggestion by the rail respondents that there is an "old system" and a "new system" is misleading. The physical operations performed by PTSC in connection with cars held on demurrage on its lines are exactly the same today as they were before Item 380(F) became effective. The only change is that PTSC is no longer being compensated for the cost of those operations. Instead, the line-haul carriers are collecting and retaining the demurrage charges even though they perform absolutely no physicial function in connection with handling of cars held on the lines of PTSC any more than they did before Item 380(F) became effective. Thus, contrary to the implication of the argument of rail respondents, there has been no enhancement in car utilization since rail respondents are simply not in a position to make any such change.

In their argument, rail respondents suggest that great deference is due to the ICC in a matter of this type since it involves "the process of rate making". That statement is not accurate. There is no issue of "rate making" involved in this case. The levels of demurrage charges applicable to rail cars held on the lines of PTSC is not an issue in this proceeding and has never been an issue. Nor is the level of any other rate. Rather, the issue, as stated by petitioners, is a simple and direct one. It involves an action of the ICC purporting to authorize one carrier to collect and retain the charges attributable to a terminal service provided by another carrier. In this regard, it is also appropriate to comment upon the contention vigorously asserted by rail respondents that "demurrage fees are not paid to someone on receipt of a service". That contention is refuted by the ICC's own rules which expressly recognize demurrage as a terminal service. Specifically, 49 C.F.R. § 1300.10(a) provides in pertinent part as follows:

> Each carrier or its agent shall publish, post and file tariffs which shall contain in clear, plain, and specific form and terms all the rules governing and rates and charges for *demurrage,* switching, floating, lighterage, wharfage, *and other terminal services.* [Emphasis added].

Thus, demurrage is indeed a terminal service. More specifically, it is a terminal service which is performed by the carrier on whose line the car holding occurs. *Demurrage Rules and Charges, Nationwide,* 340 ICC 83 (1971).

At pages 15 through 17 of their brief in opposition rail respondents present an argument grounded upon a speech delivered by former ICC Chairman A. Daniel O'Neal in 1978. In that speech reference is made to a 1975 decision which rail respondents represent as having some precedential value in this case. That decision of the ICC, *Remittance of Demurrage Charges,* 349 ICC 411 (1975), actually confirmed the right of the carrier on whose lines demurrage accrues to collect demurrage charges. What the case held is that the delivering carrier should remit to the car owner all demurrage charges in excess of $10 per car which was recognized as essential to compensate the delivering carrier for the costs associated with holding cars on demurrage. This represented a departure from the former rule which provided for the delivering carrier to remit per diem to the car owner and retain the balance of the demurrage charge. This would result in retention of a smaller portion of the demurrage charge by the terminal carrier and it is that result which Chairman O'Neal recognized a one which would not make the carrier representatives in his audience "very happy".[2]

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[2]It is noteworthy that Chairman O'Neal rendered the dissenting opinion in both decisions issued by the Commission in Docket No. 36927, *South Carolina Public Railways Commission Petition For Declaratory Order,* the case in which the ICC refused to institute a proceeding to resolve the lawfulness of Item 380(F) and directed SCPRC to file a formal complaint. Chairman O'Neal observed in his dissents that the position of SCPRC appeared to be meritorious and should be considered by the ICC.

If the case is of any significance here it is because it confirms the validity of petitioners' position that the ICC, prior to the case which is here under review, consistently recognized the right of the delivering carrier to retain a portion of demurrage charges to cover the cost of holding cars on its lines. Specifically, the ICC stated that: "The amount retained by the serving [i.e., terminal] carriers, in fairness, should be sufficient to cover all expenses incident to demurrage and to the administration of this proposal." 349 ICC at 442.

It is also noteworthy that the decision referred to by Chairman O'Neal never actually went into effect. See, *Remittance of Demurrage Charges*, 364 ICC 623 (1981). Thus, what rail respondents have tendered to this Court as authority for their arguments is a speech making reference to a decision of the ICC which never became effective. Such representations have no proper place in briefs filed with this Court.

Petitioners could cite further inaccuracies in the rail respondents' brief in opposition; but, as previously stated, petitioners have no desire to engage in an exchange which can only serve to divert the Court's attention from the very critical issue affecting terminal carriers nationwide. Petitioners would respectfully suggest to the Court that the character of rail respondents' brief provides compelling insight into the intensity and far-reaching impact of this proceeding.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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